



U.S. Department of Justice

1267399 - R8 SDMS

Environment and Natural Resources Division

HKH
DJ #90-11-3-08278

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August 12, 2011

CONFIDENTIAL SETTLEMENT COMMUNICATION
Subject to Federal Rule of Evidence 408/ Confidentiality Agreement

Joseph Middleton, Esq.
TEMKIN WIELGA & HARDT, LLP
1900 Wazee Street, Suite 303
Denver, CO 80202

Re: Gilt Edge Mine Superfund Site

Dear Mr. Middleton:

This letter follows up on our June 28, 2011 phone conversation, and your July 19, 2011 letter to me regarding the Gilt Edge Mine Site ("Site") in Lawrence County, South Dakota. As explained in further detail below, CoCa Mines does not qualify for a *de minimis* settlement, nor is the harm at the Site divisible among potentially responsible parties.

The United States alleges that CoCa Mines, Inc. ("CoCa Mines") is jointly and severally liable for response costs incurred and to be incurred at the Site, pursuant to Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(2). CoCa Mines is the successor to Congdon & Carey, Ltd. 5 ("Congdon & Carey"), which owned leasehold mining claims and operated at the Site from 1975 to 1982. In 1982, CoCa Mines became an owner and operator at the Site pursuant to an Agreement and Plan of Reorganization that transferred property rights and business operations from Congdon & Carey to CoCa Mines. In 1983, CoCa Mines signed the Lacana Mining Agreement with Lacana Mining, Inc. ("Lacana") (d/b/a Gilt Edge, Inc.). While day-to-day operations were handed over to Lacana after this time, CoCa Mines continued to be involved at the Site, owning leasehold mining claims and consulting with Lacana on operations and expenditures.¹ In 1986, Brohm Mining Company ("Brohm") acquired rights to mine at the Site.

You have asked whether CoCa Mines' involvement at the Site qualifies for a *de minimis* settlement pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g). CoCa Mines does not meet the requirements for a *de minimis* settlement. Section § 122(g)(1)(A) requires EPA to evaluate the amount and level of toxicity of the hazardous substances contributed by a single party in

¹ For a description of operations at the Site from 1975 through 1986, please see the attached table. The United States alleges that Congdon & Carey, and later CoCa Mines, were operators during this time along with other parties including Cyprus Mines Corporation, Amoco Minerals Company, and Lacana Mining Company. The majority of these operations were conducted on mining leasehold claims owned by Congdon & Carey and later CoCa Mines.

comparison to the other hazardous materials at a site. See 42 U.S.C. § 9622(g)(1)(A). Traditionally, EPA has done this by evaluating evidence provided by potentially responsible parties (“PRPs”) related to their waste contribution at a site. In this case, we have no evidence that the amount or toxicity of CoCa Mines’ waste that was disposed of at the Site was minimal compared to other PRPs. This is because of the nature of the harm at this Site.

The primary harm at the Gilt Edge Mine Site is acid rock drainage (“ARD”), which contains hazardous substances of varying degrees of toxicity that must be treated on a continuous basis. Acid rock drainage is characterized by low pH, elevated metals, sulfate, and dissolved solids in the drainage emanating from the sulfide rock sources. Acid rock drainage at this Site contains hazardous substances including arsenic, cadmium, chromium, copper, lead, manganese, nickel, and zinc, which are “hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). See also 40 C.F.R. § 302.4(a) and Table 302. About 100 million gallons of ARD per year is treated continuously at the Site. The management and treatment of this ARD accounts for the majority of response costs EPA seeks to recover in this case.

Mining activities engaged in by CoCa Mines and other parties throughout the history of the Site have caused the creation of ARD. Specifically, mining activities such as drilling, digging adits, and blasting rock have exposed rock surfaces to air and water, which created ARD. These rock surfaces have been exposed for decades, allowing for the creation of ARD the entire time – an amount that would not qualify as *de minimis*. In particular, the drilling that CoCa Mines and Cyprus Mines conducted through their Joint Venture Agreement created sources for ARD and pathways for its migration that can never be quantified. Thus, a settlement pursuant to Section § 122(g)(1)(A) is not appropriate. Id.

Neither does CoCa Mines qualify for a *de minimis* settlement under Section § 122(g)(1)(B), which provides that a *de minimis* settlement may be offered when a party is the owner of the real property on or which the facility is located, and the party did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility and did not contribute to the release or threat of release of a hazardous substances through any action or omission. 42 U.S.C. § 9622(g)(1)(B). It is clear from the evidence that Congdon & Carey and later CoCa Mines through their operations at the Site contributed to the release or threat of release of ARD at the Site. Thus, a settlement pursuant to Section § 122(g)(1)(B) also is not appropriate. Id.

With regard to CoCa Mines’ liability relative to other potentially responsible parties, this is an issue of divisibility of harm. As you know, liability under CERCLA is joint and several unless a potentially responsible party can meet its burden to prove that the harm is divisible and capable of apportionment. See Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1870 (2009). Equitable considerations play no role in the apportionment analysis. Id. at 1882. In order to succeed in apportioning liability for a single harm such as ARD, CoCa Mines must show *both* that:

- 1) the harm is theoretically capable of apportionment; and
- 2) that there is sufficient evidence to allow a court to apportion liability for such harm and the resulting costs.

Id. at 1881; see also United States v. Hercules, Inc., 247 F.3d 706, 718 (8th Cir. 2001). Both parts of divisibility are at issue in this case, and the burden is on CoCa Mines to prove them.


On the issue of whether the harm is theoretically capable of apportionment, CoCa Mines cannot meet its burden. Not all harm can be apportioned, as many courts have determined. Harm at this Site cannot be apportioned because, among other reasons, co-mingled wastes have varying or unknown degrees of toxicity or *migratory potential*. See Ashley II of Charleston, LLC v. PCS Nitrogen, 2011 WL 2119256 **41-48 (D.S.C. 2011); see also 3000 E. Imperial, LLC v. Robertshaw Controls Co., 2010 WL 5464296 **9-11 (C.D. Cal. 2010). Courts also have determined that where there have been successive site owners and changes in operations over time, these facts preclude a reasonable apportionment of harm. See e.g. United States v. Vertac Chemical Corp., 453 F.3d 1031, 1047 (8th Cir. 2006). At this Site, there have been numerous owners and operators who have conducted a variety of mining activities.

On the issue of whether there is sufficient evidence to allow a court to apportion liability for harm and the resulting costs, CoCa Mines also cannot meet its burden. As previously mentioned, Congdon & Carey's and CoCa Mines' total waste contribution is uncertain. See Chem-Nuclear Systems, Inc. v. Bush, 292 F.3d 254, 260-61 (D.C. Cir. 2002). It is simply not possible in this case to determine the amount of ARD contributed by CoCa Mines versus the amount of ARD contributed by any other potentially responsible party at the Site.

At our meeting last year, an apportionment formula was presented to the United States using tons of earth disturbed converted to percentages for each operator as a proxy for harm at the Site. This formula presupposes that ARD generation is directly correlated to the tons of earth disturbed. There is no evidentiary basis for this claim. In fact, ARD generation is not directly correlated to earth disturbed for several reasons: different rock has different acid generating potential (e.g. Anchor Hill v. Sunday/Dakota Mait pits); the time period that the rock is exposed affects ARD generation; climatic variability affects ARD generation; subsequent processing and handling of exposed rock affect ARD generation; and reclamation and water management at the Site affect ARD generation. As you may be aware, a post-Burlington Northern court rejected a similar approach to apportionment of harm at a CERCLA site. See Ashley II, 2011 WL 2119256 *46, *48.

While CoCa Mines does not qualify for a *de minimis* settlement, and the harm at the Site is not divisible, the United States is interested in settlement of this case. I look forward to talking with you in the near future about these issues.

Sincerely,

A handwritten signature in black ink that reads "Heidi K. Hoffman". The signature is written in a cursive, flowing style.

Heidi K. Hoffman

cc: Roxanne Giedd, State of South Dakota
Andrea Madigan, U.S. EPA
Sharon Abendschan, U.S. EPA

Work at Gilt Edge Mine Site – 1975 to 1986

Year	Drill holes	Sampling/Testing	Adits/Tunnels	Other
1975	50 sites prepared 42 rotary drill holes (9,749 feet)	451 float, dump, tailings and outcrop surface samples collected 148 rock chip samples from underground		
1976	7 diamond drill holes (2,485 feet) 39 rotary drill holes (10,015 feet)			
1977	19 rotary drill holes (4,750 feet)			
1978	24 rotary drill holes (5,570 feet)	6 x 50-lb samples 2 x 400-lb samples 1 x 80-lb sample		
1979	64 rotary drill holes (15,530 feet)	21 x 1-ton samples 6 x 150-lb samples from Sunday 6 x 150-lb samples from Dakota Maid 2,100 lbs of Tailings Pile drill samples		
1980	9 diamond core (6,917 feet) 27 rotary holes (6,675 feet)	5 x 15-ton samples from Rattlesnake 1 x 25-ton sample from King Tunnel 1 x 25-ton sample from Laron Adit 10 x 1-ton samples from King Tunnel	Excavated new Laron Adit Excavated New King Tunnel	Area adjacent to Sunday Pit was blasted to break away 3,000 tons of rock Heap leach pad constructed and operated using 1,700 tons of this rock
1981	18 diamond core (19,739 feet)			Continued operation of heap leach pad
1982	3 diamond core (4,509 feet) 22 rotary drill holes (7,090 feet)			Overflow of cyanide-bearing water from heap leach pond
1983	12 diamond core (8,482 feet) 43 rotary drill holes (14,013 feet)			
1984	14 rotary drill holes (3,850 feet)	Bulk samples collected in underground workings -5 samples in each of 47 rounds 47 x 50-75 lb samples 94 x 25-50 lb samples 94 x 10-20 lb samples	240 ft cross cut from Rattlesnake workings	
1985	9 rotary drill holes (1,187 feet)			26 test pits
1986				Reserve calculations, metallurgical testing, mine plan development, obtained permits